No. 21964

IN THE

United States Court of Appeals
For the Ninth Circuit

LOREN FORD and FRANCES FORD, Husband and Wife, and DAVENPORT EQUIPMENT COMPANY, INC., a Washington Corporation,

Appellants,

vs.

INTERNATIONAL HARVESTER COMPANY, a Delaware Corporation,

Appellee.

No. 21964

Appeal from a Judgment of the United States District Court for the Eastern District of Washington Northern Division

REPLY BRIEF OF APPELLANTS

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TEXT

ADDITIONAL STATEMENT OF THE CASE

Reference is made in the Appellee's Additional Statement of the Case to certain oral discussions which took place between Harold Berry, the District Manager for Harvester and the plaintiff Ford in 1961 concerning the operation of a Harvester dealership in Edwall, Washington by the St. John Hardware. It is pointed out to the Court that the District Manager Berry, at no time informed Ford that Harvester would not live up to its agreement with Ford. The only statement made by Berry was that Howell had threatened to sue Harvester if they (Harvester) tried to put him out of Edwall. At this point Ford informed Berry that he in turn would sue Harvester if they did not terminate the St. John Hardware operation in Edwall. Berry was not willing to make a decision or act upon either of these threats.

Thereafter, in March of 1961, State Senator Raugust, a successful Harvester dealer in Odessa, Washington, wrote a letter (Exhibit 131) to Harvester concerning the promises made to Ford. No reply was made to this letter by Harvester. (R 118). Likewise, on December 19, 1963 Ford wrote another letter to Harvester demanding termination of the operation in Edwall, Washington (Exhibit 124) but no reply was made to this letter by Harvester. (R 143). The first reply to any of Ford's letters to Harvester was Berry's letter of December 8, 1964 (Exhibit 127). At no time prior thereto had Harvester, or any agents thereof unequivocally informed Ford that it would not live up to the promise as made by District Manager Wells.

Another obvious inconsistency exists in Appellee's Brief. At page 2 of its Brief Appellee refers to a prospectus (Exhibit 6) given to Ford by Harvester in October, 1958. This prospectus was given to Ford prior to the promise made to Ford by Harvester as found by the Court. Certainly Appellee cannot rely on the unilateral exclusionary statement therein contained as there is no evidence whatsoever that this "prospectus" constituted a contract between the parties. Appellee itself recognizes the lack of legal efficacy of this prospectus at page 21 of its Brief with the following statement:

> "Even a cursory reading of the prospectus shows that it is neither a promise nor a representation of fact."

LIMITATIONS OF ACTIONS

The Appellee cites only two cases in answer to the Appellant's position that a continuing covenant arose by reason of the promise made by Harvester. This promise was found by the Court to be as follows:

> "That defendant (Harvester) would not permit any International Harvester farm equipment dealership to operate in Edwall, 23 miles away from Davenport, in competition with the plaintiffs (Ford) so long as the plaintiffs (Ford) were operating an International Harvester dealership in Davenport." (Tr. 46).

The case of *Kennedy vs. Neilicke Calculater Company,* 90 Wn. 238, 155 Pac. 1043 in no way supports the Appellee's position that the promise as made by Harvester was not a continuing covenant. Said case merely established that

where the defendant Calculator Company had sold defective calculators to the plaintiff and the plaintiff had knowledge that all of the calculators were defective, that the plaintiff could not expand his damages by continuing to attempt to sell the admittedly defective calculators. The Supreme Court of the State of Washington in fact affirmed the damage award to the plaintiff, reducing the judgment by the sum of $76.00 for an item of expense which was "obviously not made under and in faith of the contract, but was entirely voluntary." The cited case is not apposite to the instant case wherein damages accrued daily to the plaintiff Ford by reason of the continuing competition with Ford by St. John Hardware while Harvester was allowing St. John Hardware to operate a dealership in Edwall in contradiction of the agreement as previously made with Ford.

At page 12 of the Appellee's Brief we find the following statement:

> "Assuming for the sake of argument that Ford had a continuing contract, his cause of action arose when the first breach occurred. This question was squarely before the Court in *First Loan and Trust Company vs. Schanche,* 206 N. W. Reporter, 390 (South Dakota), which involved a contract of continuing support."

It is respectfully submitted that the cited case is in fact a separate and distinct case from the one involved herein, and in fact contains language which supports the Appellant's position. In the cited case the Court merely held that where an agreement for support contained a provision for stipulated liquidated damages of $500.00 upon breach that

since the damages were stipulated, the statute of limitations ran from the date of the breach. At page 391 of the cited case the Court states as follows:

> "Under the terms of the contract, the full amount of the stipulated damages became due and owing upon the breach thereof and could then have been recovered."

In the instant case it is obvious that the damages incurred by the plaintiff Ford were not liquidated, and of course a full recovery of damages by Ford could not have been had upon the first breach by Harvester. The cited case supports the position of the Appellant Ford in stating as follows:

> "In determining when the statute begins to run upon the breach of a continuing contract, the question depends largely upon the inquiry whether a complete right of action accrued at the time of the first breach."

Obviously in the instant case the damages which might be incurred by Ford could not be determined or had upon the first breach by the defendant Harvester.

A further case which establishes the doctrine of a continuing breach is *Builders Supply Corporation vs. Marshall*, 352 Pac. (2d) 982. In discussing continuous breaches the Court states at page 986 as follows:

> "A cause of action accrues — in the terms of the statute of limitations — each time defendant fails to perform as required under the contract . . . perhaps plaintiff might have considered the underpayment of No-

> vember, 1948 as a repudiation of anticipatory breach and brought suit at that time for all his prospective losses, *but his failure so to do did not deprive him of his legal right to recover each deficiency as it appeared.* (Emphasis supplied). Thus, although the six-year limitations barred the recovery of any debt arising prior to May 16, 1949 (6 years before the Complaint was filed) obligations accruing after that date still are enforceable."

It is submitted that the promise and covenant by Harvester to Ford was a continuing promise that Harvester would not allow another Harvester farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating the Harvester dealership in Davenport. It is likewise submitted that Harvester continuously breached its promise to Ford, so long as Harvester permitted St. John Hardware to operate in Edwall in competition with Ford.

The Appellee takes the position at page 7 of its Brief that "Harvester breached the alleged agreement when the dealer was permitted into Edwall." *The distinction here is important.* The promise as found by the Court *was not* that "Harvester would not permit a dealer to go into Edwall," but in fact the promise found by the Court was that *"the Harvester Company would not permit any Harvester dealership to operate in Edwall, Washington in competition with the dealership of Ford, as long as Ford was operating an International Harvester dealership in Davenport, Washington."* (Finding of Fact VI, Tr. 46). Each day that Harvester allowed St. John Hardware to operate in Edwall con-

stituted a breach of the agreement. In this connection the attention of the Court is called to the provisions of the Dealer Sales and Service Agreement between the Harvester Company and St. John Hardware and Implement Company covering St. John's operations. (R 284, 285, 286.) (Exhibit 112). At page 19 of Appellee's Brief we find the following statement.

> "In the instant case Harvester is not responsible for the sales made by St. John Hardware at its branch store in Edwall, and any damages allegedly suffered by Ford were not the proximate result of Harvester's entering into a written dealership with St. John Hardware several months after it actually opened for business in Edwall. *St. John Hardware could have done business at Edwall without a dealership agreement indefinitely.*"

This statement of the Appellee is contrary to the facts and law of the case. At page 13 of St. John Hardware's Dealer Agreement, under "Termination for Cause, sub paragraph (3) (viii), it is provided that the company may at its option terminate the agreement effective at once in the event of the happening of any of the following:

> "(viii) If, without the written consent of the company signed by the District Manager or Assistant District Manager, the Dealer shall sell or offer for sale any of the goods purchased under the agreement at or from any retail establishment other than the establishment referred to on page 3 of the agreement, any such consent, if given, being subject to withdrawal at any time by written notice to the Dealer signed by the District Manager or Assistant District Manager." (Exhibit 112) (Tr. 284, 285, 286).

From the foregoing it is obvious that the Appellee's statement: "St. John could have done business in Edwall without a dealership indefinitely," is completely without factual foundation, as such operations were contrary to the provisions of St. John's Dealership Agreement. (R284, 285, 286). Likewise, under paragraph 24 (c) of St. John's Edwall Dealership Agreement, (Exhibit 112) Harvester could have terminated St. John's operation in Edwall *without cause* upon thirty days notice.

PAROLE EVIDENCE RULE

The defendant Harvester Company has likewise attempted to impose the parole evidence rule in an effort to avoid its liability to the plaintiff Ford. The Court's attention is called to the fact that the defendant Harvester Company is relying upon it standard form sales agreement which is delivered to all dealers. Such contracts are referred to as "Adhesion Contracts." The treatment to be accorded such contracts is succinctly set forth in *Standard Oil vs. Perkins,* 347 Fed (2d) 379 (1965) where at page 383 the Ninth Circuit Court of Appeals stated as follows:

> "It bears emphasis that we here deal with a so-called "Adhesion" contract prepared by Standard. Provisions in such contracts should be construed in accordance with the understanding attached to them by laymen unversed in the law. 'Adhesion Contract' is a handy shorthand description of standard form printed contracts prepared by one party and submitted to the other on a take it or leave it basis. The law has recognized there is often no true equality of bargaining power in

such contracts and has accommodated that reality in construing them."

Exhibit 101, the standard form Dealer Sales and Service Agreement makes no reference whatsoever to whether or not defendant Harvester would allow another Harvester dealer to operate in Edwall in competition with the plaintiff Ford's dealership in Davenport. The first paragraph of the standard form agreement states as follows:

> "The general purposes of the agreement are to establish the dealer as a *dealer of the goods* covered by the agreement and *to govern the relations between the dealer and the company in promoting the sale of those goods*, in the purchase and sale by the dealer, and in providing warranty and other services for their users."

The oral agreement as found by the Court in no way varies, alters, or contradicts the standard form agreement. The agreement in question pertains only to the sale of goods and the merger clause as contained in paragraph 29 of the standard form agreement states as follows:

> "All understandings and agreements between the parties are contained in the agreement, which supersedes and *terminates all previous agreements* between the parties *pertaining to the sale of the goods covered by this agreement.*" (Emphasis supplied).

Obviously this merger clause applies only to "previous agreements between the parties pertaining *to the sale of goods* covered by this agreement." Nothing whatever is said concerning operations in Edwall, Washington in any portion of this standard form agreement.

The law in the State of Washington clearly establishes that people have the right to make their agreements partly oral and partly in writing, and the parole evidence rule only prevents the introduction of parole testimony which is in contradiction of the written agreement. In *MacGregor vs. First Farmers Merchants Bank,* 180 Wn. 440 (1935) 40 Pac (2d) 144, the Court at page 444 stated as follows:

> "Certain exceptions to the rule are as firmly established as the rule itself. In fact, they may be said to be a part of the rule. We mention only one or two of the exceptions which we conceive to be applicable here. One is that, where a parole contemporaneous agreement is the inducing and moving cause of a written contract, or where a parole agreement forms a part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parole contract or representations, then such evidence is admissible."

In *Barber vs. Rochester,* 52 Wn. (2d) 691 (1958) 328 Pac (2d) 711, the Court at page 698 stated as follows:

> "People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the Court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing, or not. That is a question of fact."

Likewise at page 697 of Barber vs. Rochester, supra, the Court cited Wigmore on Evidence as follows:

> "Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent

of the parties thereto. In this respect the contrast is between voluntary integration and integration by law. (post § 2450). Here the parties are not obliged to embody their transaction in a single document; yet they may, if they choose. Hence it become merely a question whether they have intended to do so.

"This intent must be sought where always intent must be sought (ante § § 42, 1714, 1790), namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witness may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears evidence on both sides; his decision here, pro or con, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that if they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that if they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place."

In the case of *Becker vs. Lagerquist Brothers, Inc.*, 55 Wn. (2d) 348 Pac. (2d) 423, the Court dealt with a parole agreement and likewise a claim similar to the one made in the instant case by the defendant Harvester that the merger clause prevented evidence of an oral agreement. The Court at page 429 cited 55 Am. Jur, 573, 574, ¶ 98 as follows:

> "The parole evidence rule does not exclude evidence of an oral agreement which the parties could not reasonably be expected to embody in the written agreement."

The Court likewise stated as follows:

> "Where a contract required to be in writing is in writing, an independent collateral agreement with reference to the same subject matter, may be in parole where the statute does not require it to be in writing . . . the so called parole evidence rule is not an exclusionary device to prevent the introduction of oral testimony. The primary test for applying it was stated in *Gaffney vs. O'Leary*, 155 Wn. 171, 283 Pac. 1091 as 'the first question is whether the entire contract of the parties was embodied in the order referred to and therefore was not subject to be supplemented by oral testimony. The well settled rule is that, where it appears that only a part of a contract is in writing, the part not in writing may be proved by oral testimony insofar as it is not inconsistent with the written portion."

In University Properties, Inc. vs. Moss, 63 Wn. (2d) 619 (1964), 388 Pac. (2d) 543, the doctrine of "Partial Integration" is recognized. At page 621 the Court states as follows:

> "The general rule is that the terms of a written lease may not be added to, contradicted, or varied by its extrinsic evidence. A time honored exception to the rigidity of this rule is the doctrine of 'partial integration.' 9 Wigmore on Evidence § 2430. The writing may be a final expression of the agreement between the parties only as to such terms as are included therein. Evidence of additional terms is admissible unless the Court finds that the writing was intended as a complete, exclusive statement."

It is respectfully submitted that the oral agreement as found by the Court in no way adds to, contradicts or varies the standard form contract of Harvester, and that likewise the Trial Court found that the standard form agreement did not contain all of the agreements of Ford and Harvester.

DEALERSHIP & EXCLUSIVE AGENCY CASES

The defendant Harvester has cited several cases contending that the promise as made by Harvester to the plaintiff Ford was "illusory." A reading of these cases clearly establishes that they are not applicable to the instant case. The case of *Curtis Candy Company vs. Silverman*, 45 Fed. (2d) 451 did not turn upon an agreement such as the one in the instant case, but rather was disposed of on a finding of a termination of the agreement prior to any damages being incurred. In fact the Court did allow such damages as accrued prior to a termination of the agreement in question.

The case of *International Shoe Company vs. Carmichael*, 114 So. (2d) 436 contained only a finding that the damages suffered by the dealer did not result from any breach of the alleged agreement. Such is not the case in the instant

case, as the Court has specifically found that the plaintiff Ford was damaged in the amount of $39,300.00 by reason of the defendant Harvester's breach of its agreement. (Tr. 49-50).

The Appellee Harvester has mistakenly emphasized its statement as follows:

> "St John could have done business at Edwall without a dealership agreement indefinitely." (Appellee's Brief, page 19).

As has been previously pointed out, the dealership agreement between St. John Hardware and Harvester prevented St. John Hardware from doing business in any location other than St. John, Washington without the written approval of Harvester and the setting up of a business by St. John Hardware in Edwall was in contradiction of the written terms of the dealership agreement between Harvester and St. John Hardware. (R284, 285, 286). Harvester was legally in a position where it could have at any time required St. John Hardware to terminate its operation in Edwall, Washington. Even after the execution of a contract by Harvester with St. John Hardware for a dealership in Edwall, Harvester could have, under the terms of its written contract with St. John Hardware, terminated the operation in Edwall upon thirty day notice. (Exhibit 112 ¶ 24) (c).

The case of *Ford Motor Company vs. Kirkmyer*, 65 Fed. (2d) 1001 has no application to the instant case, inasmuch as that action was merely an action by a dealer for damages

based upon the termination of an agreement which the Court found to be terminable at will. Such was not the case in the instant action. This action is one for damages arising during the existence of a specific covenant as found by the Court.

DAMAGES

The Appellee contends that there is no evidence upon which to base lost wages of $800.00 per month suffered by Mr. Ford as a result of the breach of the agreement by Harvester. It is submitted that such a finding is within the testimony. In response to a question as to whether or not the sum of $600.00 a month was a reasonable sum for a salary for Mr. Ford in his business in Davenport, Washington, Senator Raugust stated as follows:

> "Why, that is lower than I pay my bookkeeper." (R 119).

The loss of Mr. Ford's capital investment was found to be the sum of $3,300.00. (Tr. 50) (R 145). Likewise Senator Raugust testified that had there not been a Harvester dealer in Edwall the Davenport dealership would have done a gross sales of $250,000.00 per year and that the profits from such sales should have run from 3% to 5%. (R 121). As such, the findings of the Court of lost profits of $7,200.00 per year is entirely within the testimony.

CONCLUSION

The Trial Court found that Harvester made a separate

independent promise to Ford, to-wit: That Harvester would not permit any Harvester dealership to operate in Edwall, Washington in competition with the dealership of Ford so long as Ford was operating a Harvester dealership in Davenport, Washington. This obligation on the part of Harvester continued from the commencement of Ford's dealership in Davenport, until its termination. It is respectfully submitted that this promise and covenant by Harvester was a continuing one. The Statute of Limitations would only bar recovery for damages arising from breaches of this covenant more than three years prior to the commencement of this action. The Judgment in favor of International Harvester Company dismissing the Complaint of the plaintiffs Ford et ux, et al should be reversed and the cause remanded to the Trial Court for entry of Judgment in favor of Ford in the amount of damages as determined by the Trial Court.

Respectfully Submitted,

QUACKENBUSH, DEAN AND SMITH

By 

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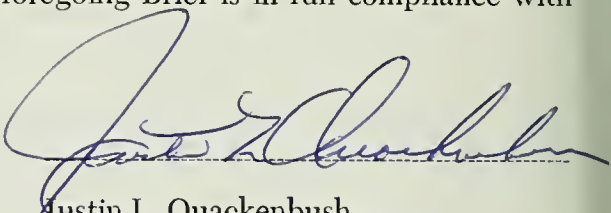
CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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